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Airport Noise Litigation Case Law Review (1973-1980)

Bolt Beranek and Newman, Inc.
Canoga Park, CA

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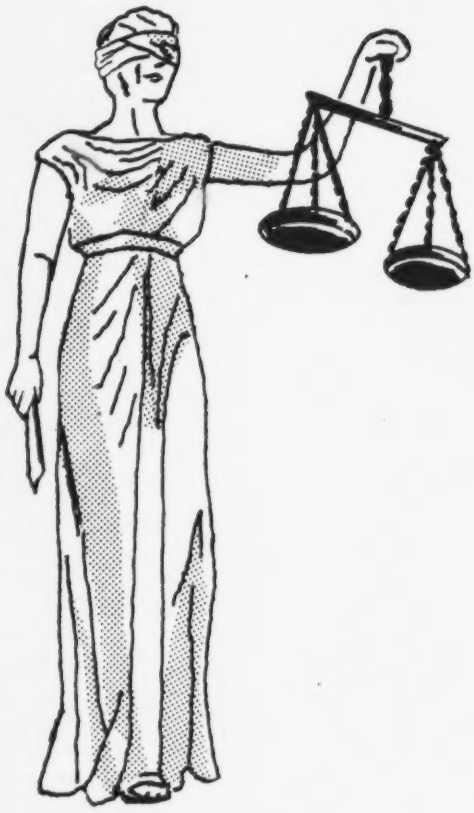

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April 1981

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16. ABSTRACT

This report examines the judicial trends in airport noise litigation by analyzing the decisions from many of the relevant legal cases since the 1972 U.S. Supreme Court decision in City of Burbank v. Lockheed Air Terminal Inc. The conflict centers upon who controls the source of the aircraft noise and who is liable for aircraft noise-related damages. The significant issues arising out of these various airport/aircraft noise cases examine this conflict from four viewpoints: 1) who is liable for aircraft noise related damages? 2) what is the scope of airport use restrictions? 3) what are the legal theories and trends in awarding aircraft noise-related damages? 4) what is the effect of land use planning and environmental impact statements on airport noise control?

This extensive case law review indicates that the courts are continuing to hold the airport proprieter liable for aircraft noise-related damages. The judiciary is also expanding the legal theories and granting recovery for noise-related effects on people under the nuisance theory of emotional distress as well as under the traditional inverse condemnation theory for deprivation of property.

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AIRPORT NOISE LITIGATION: CASE LAW REVIEW

** AIRPORT NOISE LITIGATION: CASE LAW ANALYSIS **

Aircraft noise law is slowly evolving through judicial interpretation and legislative enactment. The classic struggle between maintaining the power to control aircraft noise but at the same time avoiding responsibility for damages caused by the noise is the dilemma that causes confusion among the various governmental authorities and private entities. The courts, in their attempt to solve this maze of competing social, economic and governmental objectives, have focused on the airport proprietor's authority and methods to control airport noise. Their decisions have set some legal precedents and created a multitude of unfulfilled expectations. The judiciary, in its decision making capacity, is guided by previous decisions, statutes and Congressional intent; the legislature in turn is influenced by the implications reflected in judicial holdings. Therefore, prior to promulgating yet another piece of legislation, it is advisable to gain some historical perspective on the judicial trends in airport noise litigation by examining many of the relevant cases that have been scrutinized in the courtroom since the Supreme Court decision in City of Burbank v. Lockheed Air Terminal,Inc., 411 U.S.624 (1973).

This report focuses upon federal or state legislation only in passing, as it impacts the various judicial decisions. The emphasis is upon the analysis of factual situations and judicial decisions. These are reviewed in an attempt to define the predominent issues arising out of the conflict between who controls the source of aircraft noise and who is liable for aircraft noise-related damages.

The significant issues in the various aircraft/airport noise cases analyzed in this report can be organized under four topic headings that will allow us to trace judicial progress in the area of airport noise litigation. The headings are as follows:

I. Which governmental or private entity have the courts held responsible for aircraft noise related damages?

II. What is the scope of airport proprietary and non-proprietary use restrictions?

III. What are the current legal theories and trends in awarding aircraft noise related damages?

IV. What is the effect of land use planning and environmental impact statements on airport noise control?

I. WHO IS LIABLE?

The issue of which governmental or private entity will carry the financial burden for aircraft noise-related damages is argued in conjunction with the issue of who has control over the noise source which causes the damage. While the federal government professes to have the sole right to control the use and management of airspace, and in turn regulate the aircraft noise source, it has declined to be responsible for injury to persons or property caused by aircraft noise. For the most part, the plaintiffs and courts have looked to the airport proprietors for monetary liability. And, in turn, the airport proprietors have argued that, lacking control of the noise source, they should also be absolved from responsibility for aircraft noise-related damages. The airport proprietors have pointed to the airplane manufacturers as the responsible parties for their failure to produce a "quiet" airplane, and to

the federal government for enacting legislation which preempts noise source and airspace management.

Since the decision in Griggs v. Allegheny County, 369 U.S.84 (1962), the courts have pointed to the airport proprietor as the party with the responsibility and concomitant financial liability for aircraft noise related damages. In that case, Mr. Justice Douglas held that the local government, as owner-operator of the airport, had the responsibility and authority to acquire adequate land adjacent to the airport and was thus liable in damages to the plaintiff landowner who had been deprived of the use and enjoyment of his property by direct aircraft overflights.

In Griggs, Mr. Justice Douglas held that the local government, as the airport proprietor, and not the FAA, had established an avigational easement over Mr. Griggs' property by reason of the direct aircraft overflights. This action had substantially deprived Mr. Griggs of the use and enjoyment of his property without just compensation. Thus, it was the governmental airport proprietor and not the FAA as the agency which controlled the use and management of the airspace, which was liable for compensatory damages.

In his dissent, Mr. Justice Black disagreed with this conclusion. He noted that the FAA, as an agency of the federal government, had supervised, approved, and in large part paid for the airport construction. He reasoned that the federal government owes the just compensation because Congress had initiated a comprehensive regulatory scheme that not only appropriated the airspace necessary for airplanes to fly at high altitudes but also provided restrictions on the low altitude airspace necessary for the takeoff and approaches to airports.

Congress has endorsed the position of Mr. Justice Douglas and has tried in several Congressional enactments to clarify this area of primary authority. The Noise Control Act of 1972 (42 U.S.C. 4901 *et seq.*), emphasized that federal action is essential to deal with "major noise sources in commerce, control of which requires national uniformity of treatment." But, ultimately Congress intended that "the primary responsibility for control of noise rests with state and local governments." The following legislation, and policy statements, also stress that the responsibility of noise control rests with the airport proprietor: the Airport and Airway Development Act of 1976 (PL 94-353, 49 U.S.C. 1701 *et seq.*), the Aviation Noise Abatement Policy of 1976 (FAA/Department of Transportation), the Airlines Deregulation Act of 1978 (PL 95-504, 49 U.S.C. 1305 (a)(1)), the Aviation Safety and Noise Abatement Act of 1979 (PL 96-193, 94 Stat. 50), and the Airport Noise Compatibility Planning Act of 1981 (14 C.F.R. Part 150).

The legislative history of the 1968 addition of Section 611 to the Federal Aviation Act of 1958 (Senate Report No. 1353, 90th Cong., 2d Sess. pp.6-7,49 U.S.C. 1301 *et seq.*) was examined by Mr. Justice Douglas in the much quoted footnote 14 of the Burbank (*supra.*) case. The legislative history was a letter from the then Secretary of Transportation Boyd to the Senate Commerce Committee reviewing this proposed legislation. In this letter, Boyd stressed that the proposed legislation would not affect the rights of a state or local public agency, as the proprietor of an airport, to issue nondiscriminatory noise control regulations. Mr. Justice Douglas concluded in Burbank that the non-proprietor municipality was preempted by federal legislation from imposing a curfew on airport operations. At the same time, he left open the question of how much authority a municipality as airport proprietor had to control these very same airport/aircraft operations.

The three judge court in Air Transport Association v. Crotti, 389 F.Supp.58 (N.D. Cal.1975) acknowledged the pervasive power of the federal government under the Supremacy Clause (U.S. Const. art.VI,cl.2) but ruled that the airport proprietor, who is liable for the consequences of airport operations, had the right to control the use of the airport at his own initiative or at the direction of the state. Moreover, this concept of proprietary control included "the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities...." This right of proprietorship control is exempted, according to this court's rather liberal interpretation of footnote 14 in the Burbank opinion, from federal preemption. There were, however, certain aspects of the California regulatory scheme (the single event noise exposure level (SENEL)) that were disallowed on the ground of preemption (infra.).

District Judge Peckham, in National Aviation v. City of Hayward, 418 F.Supp. 417 N.D. Cal.(1976), reached the same conclusion as the Crotti court on the basic issue of federal preemption of proprietary regulations -- in this case a noise-related night curfew imposed by a municipal airport proprietor. He refused, however, to base his conclusions on footnote 14 of Burbank but instead focused on the Congressional intent not to interfere with the proprietor's powers to control airport noise levels (Senate Report No. 1353, 90th Cong., 2d Sess. pp.6-7). He emphasized that both Congress and the FAA had the power to enact legislation that would provide a uniform system of federal regulations, but since "at the present time, Congress and the FAA do not appear to have preempted the area, then the City of Hayward as proprietor of Hayward Air Terminal, cannot be enjoined from enforcing Ordinance 75-023 CS on preemption grounds."

The issue of federal preemptory powers under the Supremacy Clause of the Constitution and airport proprietary rights to determine noise exposure by controlling airport operations was thoroughly litigated in British Airways Board v. Port Authority of New York, (Concorde I) 431 F.Supp. 1216 (S.D.N.Y.),rev'd., 558 F.2d 75 (2d Cir.),on rem'd., (Concorde II), 437 F.Supp.804 (S.D.N.Y.),aff'd.,564 F.2d 1002 (1977). The courts were forced to decide a very controversial and decidedly political issue: whether the supersonic Concorde should be allowed to conduct test flights into New York's JFK Airport. After two rounds at the federal district court level and the accompanying appellate decisions, the Concorde was allowed to operate out of JFK. The basis of the decision was not preemption by federal control of aircraft flight operations, nor the Secretary of Transportation Coleman's Order, but rather the Port Authority's abdication of its responsibility by failing to establish fair regulations for the Concorde flights within a reasonable time period (437 F.Supp. 804). Chief Judge Irving Kaufman, in the final Concorde II appellate decision, affirmed the airport proprietor's power to regulate the noise levels. He concurred with Judge Pollack, who wrote the prior second District Court decision, and stressed that airport operator's noise regulations must be "reasonable, nonarbitrary and nondiscriminatory," (564 F.2d 1002).

It was Judge Pollack's holding in Concorde I, at the initial federal district court level, that could have ultimately led to shifting financial responsibility to the federal government. In this first trial, Pollack decided that the local Port Authority's regulations banning the Concorde operations should fail because they conflicted with federal administrative orders issued by the then Secretary of Transportation Coleman. Judge Pollack concluded that the "policy of the Federal Aviation Administration (FAA) in allowing airport proprietors to impose use restrictions pertinent to perceived local noise problems is

a delegated authority reviewable by and subject to overriding control of federal authority when exercised," (431 F.Supp.1216 FAA of 1958 as amended 49 U.S.C. 1301 *et seq.*). In this case, it was exercised by Secretary of Transportation Coleman.

The U.S. Court of Appeals, for the Second Circuit under Chief Judge Irving Kaufman (558 F. 2d 75), quickly perceived the implications of the lower court ruling and reversed it as "simply untenable and erroneous." Judge Kaufman cited the federal government's *amicus curae* brief which raised for the first time on appeal the issue of the reasonableness of the Port Authority's delay. He also examined statements by the then Secretary of Transportation, B. Adams, and former Secretary Coleman and President Carter, which unanimously agreed that the Coleman Order did not preempt the Port Authority's right to exclude the Concorde pursuant to a reasonable, nondiscriminatory noise regulation. Once again the policies enumerated under Griggs (*supra.*) and implied in Burbank (*supra.*) were upheld, thus reaffirming that the authority to restrict noisy aircraft along with the concomitant liability for damages, was the responsibility of the airport proprietor.

The case was then remanded to the federal district court under Judge Pollack. In Concorde II, (437 F. Supp. 804), Pollack dissolved the ban on the Concorde test flights and concluded from the evidence that the Port Authority by its inaction "had no intention of taking responsibility for setting regulations." He stressed that the 17-month delay in determining applicable noise regulations was "unreasonable, discriminating, unfair, and an infringement on commerce and in national and international interest of the United States." Thus, while the Port Authority had the power to establish acceptable noise rules, it had waived its privilege with regard to the Concorde by its unreasonable delay.

The Port Authority appealed this decision, and Concorde II went back before the three judge panel headed by Judge Kaufman (564 F. 2d 1002). In this final appellate decision, Judge Kaufman affirmed Judge Pollack, emphasizing that the Port Authority proprietor could not "stall indefinitely in adopting noise regulations when they had all the information at its disposal."

The airport proprietors are not entirely satisfied with the singular distinction of being the parties financially responsible for damages arising from noisy aircraft. They have tried on several occasions to share the fame and frustration with other parties, notably the airplane manufacturers. In City of Los Angeles v. Japan Air Lines Co., 41 Cal. App. 3d. 416,116 Cal. Rptr. 69 (1974), the City, as owner-proprietor of the Los Angeles International Airport, attempted to obtain equitable or contractual indemnification from the aircarriers, two jet airframe and two jet engine manufacturers. The California court reasoned that the air carriers were not authorized under the California Civil Code to exerise the right of eminent domain over the airspace over or adjacent to Los Angeles International Airport. The California Civil Code specifically provided that air easements may be acquired by a county, city, port district, or airport district if such "taking" is necessary. Further, in the leasing agreements entered into by the air carriers with the city-airport proprietor, there was no indication that the parties intended the airlines to indemnify the city for using flight paths in the manner contemplated by and provided for in the lease. Therefore, without the eminent domain mandate or any contractual liability, the air carriers did not have to indemnify the city. Once again the City as owner-proprietor was solely liable for the noise related damages.

Wisconsin property owners in Luedtke v. County of Milwaukee, 371 F.Supp. 1040 (E.D.Wis. 1974), affirmed in part and vacated

in part on other grounds, 521 F.2d. 387 (7th Cir.1975), attempted to hold the County as proprietor of General Mitchell Field Airport and five federally certified airlines liable for taking their property through what amounts to an avigation servitude. The plaintiff property owners charged the defendants with negligence, the creation of a nuisance, and violation of a Wisconsin statute dealing with liability for low altitude, dangerous or damage-causing flights. The plaintiffs maintained that the defendants had subjected their property to an avigational easement without just compensation and this subjugation was actionable under the fifth and fourteenth amendments to the U.S. Constitution.

The court dismissed the charges against all the defendants under the fifth amendment on the ground that it applied only to a taking by the federal government and not to actions by state agencies or private parties. The court, likewise, dismissed the cause of action against the airlines under the fourteenth amendment. While the court acknowledged that the flight of aircraft over the land caused the deprivation of property, it was the County (the state's instrumentality) by its creation and operation of the airport which should be held responsible.

Additionally, the court determined that the airlines could not be held responsible to the plaintiffs as long as their operations constituted activities authorized by federal laws and regulations. And, in fact, the plaintiffs in this case failed to allege that the airlines had violated any federal laws or regulations. The court concluded that the proper cause of action was that of inverse condemnation against the County as the airport proprietor.

The City of Los Angeles in Aaron v. City of Los Angeles, 40 Cal.App. 3d 471 (Ct. App.),115 Cal.Rptr. 162, cert.denied 419 U.S.1122 (1975), again in an effort to avoid liability argued

airplanes are the proximate cause of the noise and the federal government, which regulates the flights in navigable airspace, should be liable for the damages. However, the court ruled that, while the federal government exerts some control over navigable airspace, this control does not immunize the airport proprietor for failure to appropriate by eminent domain or otherwise the land and airspace necessary to provide for adequate aircraft approaches.

The state of Illinois brought an action in federal district court in State of Illinois v. Butterfield, 396 F.Supp. 632 (N.D. Ill.1975) against two agencies of the federal government, the Federal Aviation Administrator (FAA) and the Civil Aeronautics Board (CAB) seeking relief from the substantial increase in aircraft operations, noise and air pollution at O'Hare International Airport. The suit charged that the FAA's policy of unlimited growth at O'Hare, its authority to approve flight paths, and the resulting pattern of aircraft operations constituted federal action affecting the quality of the environment and, therefore, required that an environmental impact statement be prepared by the FAA and CAB.

The plaintiffs argued that the Griggs case (*supra.*) was no longer valid law because the FAA Act of 1958, as amended (49 U.S.C. 1301 *et seq.*) had created a structure which provided for total federal control over the routing of commercial air carriers and over the design of aircraft and airports. The court, however, followed the holding in Griggs and held that the City of Chicago, owner-operator of O'Hare, and not the FAA or CAB, was the only proper defendant in this action.

Three other cases in recent years have dealt with the concept of who is responsible for property loss due to avigational easements which arise from aircraft overflights.

First, in Alevizos v. Metropolitan Airports Commission of Minneapolis and St. Paul (MAC), 216 N.W. 2d 651 (Minn.1974), the court held that the property owners could bring inverse condemnation proceedings against MAC to obtain compensation for the acquisition by MAC of avigational easements over their property. The court reasoned that, since MAC had the power necessary to operate and manage the airports, by implication it also had the power to acquire avigational easements in order to carry out this responsibility. Thus, action could be maintained against MAC as airport proprietor if the landowners could show a direct and substantial invasion of their property rights.

Two New York state court cases have explored whether the federal government's pervasive control over navigable airspace, as implemented by the FAA clearance zone regulations, constituted a prior taking of airspace over property. Both Kupster Realty Corp. v. State of New York, 93 Misc 2d 843,404 N.Y.S. 2d. 225 (1978) and 3775 Genesee Street Inc. v. State of New York, 415 N.Y.S. 2d. 575 (Ct.Cl.1979), held that neither the FAA Act of 1958, as amended (49 U.S.C. 1301 *et seq.*), nor subsequent regulations concerning the construction height of buildings that might infringe upon navigable airspace directly restricted the owners of private property in the vicinity of airports. Apparently the judicial interpretation of Congressional intent relative to clearance zone restrictions was that the limitation is only through voluntary compliance by the private landowners affected (FAA of 1958 *supra.*). Thus, the clearance zone restrictions per se did not constitute a prior taking, and further, any compensation for inverse condemnation must come from the municipal airport operator and not from a federal agency like the FAA.

However, in one California case, San Diego Unified Port District v. Superior Court (Britt), 67 Cal.App. 3d 361,136 Cal.

Rptr. 557, cert.denied, 434 U.S. 859 (1977), federal preemption of navigable airspace shielded the airport proprietor from liability for damages caused by aircraft in flight. But, the court did not allow the Supremacy Clause to be a total umbrella and ruled that the airport proprietor was not immune from liability for tortious mismanagement of the airport and its facilities.

The California Supreme Court in Greater Westchester Homeowners Association v. City of Los Angeles, 26 Cal.3d 86, 160 Cal.Rptr. 733, 603 P.2d 1329 (Cal.Sup.Ct.1979),cert.denied, 101 S.Ct. 77 (1980) did not entirely agree with Britt, reasoning that there was no federal immunity for the airport proprietor from tort damage liability due to excessive airport noise resulting from either aircraft in flight or the airport's location and operations. The City-airport operator was once again held to be monetarily responsible for property damage and personal injury related to aircraft noise.

A review of these federal and state cases demonstrates that the judiciary still adheres to the Griggs decision (*supra.*) and strongly emphasizes that responsibility for the consequences of noisy aircraft lies with the airport proprietor, regardless of whether the proprietor is a public entity or private party. The airport proprietor has the authority to control noise levels through determining the location of the airport, the direction of the runways and therefore the direction of flight of the aircraft, the construction and operation of the airport, zoning variances, and avigational easements. It is evident that the federal plenary powers in the area of navigable airspace do not afford an automatic shield for the airport proprietor against legal and thus ultimately financial responsibility for damages due to aircraft noise.

II. WHAT IS THE SCOPE OF AIRPORT USE RESTRICTIONS?

Over the years the courts have attempted to define which governmental or private agency can promulgate aircraft noise control regulations and to what extent. Confrontations in the courtroom abound between various combinations of different governmental entities, airport proprietors or not, as to the rights and limitations of those who control or think they can control aircraft noise. The distinction which seems to have been drawn is based on the source of power that has issued the regulation as well as the nature of the regulation or the activity regulated.

• PROPRIETOR AIRPORT USE RESTRICTIONS

The U.S. Supreme Court in Griggs (*supra.*) placed the primary responsibility for injuries to property caused by aircraft noise on the local airport proprietor to the exclusion of the federal government or the air carriers. From this judicially determined principle of liability for damages, the Supreme Court in Burbank (*supra.*), again with Mr. Justice Douglas writing for the majority, preempted the exercise of the City of Burbank's police powers which attempted to impose a curfew on the privately owned airport, and alluded (in footnote 14, Burbank) to the possible powers of the municipality-airport proprietor to issue its own controls. These two cases clearly implied that if the airport proprietor is responsible for the consequences of aircraft related noise, then there should exist the requisite authority to regulate aircraft activity.

This judicial reasoning is supported by the rulemakers in their attempt to establish a statutory scheme for the regulation of aircraft noise. Congressional intent behind the Noise Control Act of 1972 (S.Rep. No. 92-1160, 92d,Cong., 2d Sess. (1972)) was "not to propose legislation which would prevent airport proprietors from excluding any aircraft on the basis of noise considerations."

The FAA in its 1976 report entitled "Aviation Noise Abatement Policy" attempted to define the areas where the airport proprietor had authority and could implement aircraft use restrictions directly, could make proposals to the appropriate local governmental entity, or could request that proposed noise regulations be reviewed by the FAA and the general public. The airport proprietor must, of course, be mindful of Constitutional *caveats* that these use restrictions must not be unjustly discriminatory nor arbitrary, nor unreasonably interfere with interstate or foreign commerce, nor impede or interfere with the federal management and control of navigable airspace encompassing air safety and air traffic control.

The rulemakers placed the responsibility on the airport proprietor to control airport noise, but they declined to adequately guide the proprietor in issuing use restrictions. Consequently, as the following cases will attest, this grey area is slowly being illuminated in the courtroom arena.

British Airways Board v. Port Authority of New York (Concorde I and II) (*supra.*) dealt with the right of the proprietor to regulate the noise exposure at the airport by controlling airport operations. The federal appellate court held that the proprietor could regulate, but in a non-discriminatory manner, airport activities. There was evidence which showed that the Port Authority had already issued two non-discriminatory restrictions: 1) no jets could land at JFK without prior airport permission, and 2) the noise levels of all aircraft must not be greater than 112 PNdB. Although these were voluntary restrictions, in the sense that no sanctions attached to a violation, they were, nonetheless, an attempt by the proprietor to govern permissible noise levels of airplanes.

A clear attempt to exercise proprietary power was litigated in National Aviation v. City of Hayward, (*supra.*). Here the City

of Hayward, as the proprietor of the Hayward Air Terminal passed an ordinance which prohibited all aircraft which exceeded a noise level of 75 dB(A) from operating at this airport between the hours of 11:00 pm and 7:00 am. The court found the ordinance valid.

The plaintiff National Aviation, an air freight company, argued that this ordinance was a preempted exercise of police power and, in addition imposed an impermissible burden on interstate commerce. The federal district court addressed both issues. The court followed the line of reasoning from the Griggs' (*supra.*) decision and the more recent Crotti (*supra.*) holding that the airport proprietor who is responsible for the airport operations has the right to promulgate regulations aimed at aircraft noise abatement. Judge Peckham stressed that the source of this ordinance was the City of Hayward, but as the airport proprietor, it was exempt (in this court's view) from judicially declared federal preemption. The court also noted that the ordinance carried a criminal penalty and a $100 fine, but this was not sufficient evidence, in light of the prior discussion, for the court to decide that this was an exercise of police power. Peckham characterized the City as wearing two hats in trying to control airport noise. The City, as the protector of the health and welfare of the people, used its police powers in the enactment of the airport curfew, but the ordinance was adopted by the City in its capacity as the proprietor of Hayward Air Terminal.

The court found no evidence to conclude that the Hayward ordinance would impose an impermissible burden upon interstate commerce. The argument that other municipalities may be tempted to pass similar ordinances and thus together create such a burden on commerce was too speculative at this point for the court. The court viewed the matter of noise control one of peculiarly local concern and if Congress or the governmental

agencies such as the FAA wanted to preempt this area then they would have to take more definitive steps to indicate their intention to provide a uniform regulatory scheme.

Three governmental entities joined forces to exclude jets from using a general aviation airport in the City of Blue Ash, Ohio v. McLucas, 596 F.2d 709 (6th Cir.1979). The City of Blue Ash, the City of Cincinnati (which owned the airport), and the Hamilton County Regional Airport Authority (which operated the airport), all entered into an agreement to prohibit jet aircraft from using the airport. The plaintiffs brought this action to compel the FAA to delete a published notice in the "Airman's Information Manual" that the airport was closed to jets "not meeting FAR 36 noise limits." The U.S. Court of Appeals affirmed the district court's decision to dismiss the case on legal technicalitites. But the court in its opinion noted that the federal government had preempted the powers of the state and local governments and their agencies from using their police powers to control noise by regulating the flight of airplanes. However, the federal government had not preempted the right of the state or local agencies as proprietors from establishing non-arbitrary and non-discriminatory noise level regulations. In dismissing the case, the court did not address the issue whether the tripartite agreement resulted from the exercise of proprietary power, on the one hand, or police power, on the other hand.

A recent district court case which is consistent with this policy of local proprietary discretion in aircraft noise abatement matters is the California case of Santa Monica Airport Association et al. v. City of Santa Monica, 481 F.Supp. 927 (C.D.Cal.1979). The City of Santa Monica, as owner-proprietor of a general aviation airport, passed several ordinances which affected aircraft and airport operations and in turn the noise levels in the surrounding community. The court, using a two

pronged test of equal protection and interstate commerce rationale, upheld the constitutionality of all the ordinances with the exception of the total restriction on jet aircraft and a related ordinance imposing a large fine on jet landings or takeoffs. The municipality had adopted several ordinances which 1) totally restricted aircraft takeoff operations during the week between the hours of 11:00 pm and 7:00 am, 2) allowed helicopter operations, but banned helicopter training, 3) prohibited touch and go training operations of propeller aircraft on the weekends, and 4) imposed a noise level restriction of 100 dB(A) as defined by an integrated noise measure called single event noise exposure level (SENEL) and attached a criminal penalty and a fine for any violation of the noise limit.

It is interesting to note that Judge Hill in upholding the SENEL measure in Santa Monica rejected the distinction made in the Crotti (*supra.*) opinion where it was decided that SENEL was an attempt to regulate the noise levels of aircraft in flight and thus interfered in a federally preempted area. The two SENEL ordinances in both cases were similar and contained provisions for criminal penalties. But in the 1975 Crotti opinion, the Court took the view that such an ordinance was indicative of exercising the state's police powers.

A comparison can be made between the curfew ordinances in yet another California U.S. District Court case, National Aviation v. City of Hayward (*supra.*) and the Santa Monica case. Both ordinances limited the number of aircraft operations to specified hours, but the Hayward restriction was based upon noise level while the Santa Monica restriction proscribes the type of operation that may take place (no aircraft takeoffs). Both courts examined the effects of their respective ordinances on interstate commerce, but found the balance in favor of allowing the local community to control noise levels.

Airport proprietors are motiviated by social and economic objectives to place use restrictions on airport and aircraft operations. The dilemma is the desire for a quiet environment, while attempting to maintain a viable airport to service the transportation needs of the community. If Congressional intent is that airport proprietors may promulgate non-discriminatory restrictions on airport use, then there must be more definitive Congressional guidance, through such agencies as the FAA or CAB, as to what regulations are acceptable. Otherwise, there is the potential of litigation each time the proprietor attempts to impose restrictions that are perceived to infringe upon the federally preempted area of navigable airspace.

NON-PROPRIETOR AIRPORT USE RESTRICTIONS

The goal is to achieve a quiet community environment. However, the problem is which public or private agencies can implement use restrictions in order to carry out this aim. As discussed in the previous section, the courts are disposed to a municipality airport proprietor governing airport operations as long as the restrictions do not abridge the constitutionally reserved federal powers. However, the courts for the most part perceived an attempt by a non-proprietary state or local government to restrict airport operations as a prohibitive exercise of police powers. Mr. Justice Douglas addressed this issue directly in the Burbank case (supra.) when he ruled that non-proprietary restrictions were federally preempted. However, even after this seemingly clear proclamation, the courts, as will be seen in the following cases, are not of one accord regarding non-proprietary airport use restrictions.

In County of Cook v. Priester et al., 22 Ill.App. 3d 964, 318 N.E. 2d 327 (App.Ct.1974), aff'd., 62 Ill. 2d 357, 342 N.E.2d (Sup.Ct.1976), the trial court ruled that the local county government (non-proprietors) could not attach restrictions

dealing with landing and takeoff visual flight patterns or runway load bearing capacity as conditions for granting a special use permit for the construction of a private airport. The County appealed only from that portion of the trial court's decision dealing with the runway load bearing capacity. The County argued that it was using its police powers to protect the safety of the citizens living in the area surrounding the airport. It specificially denied that its special use permit was in any way motivated by noise considerations. The evidence failed to show that aircraft weight by itself would bear a direct relationship to the safety of the residents. The Illinois appellate court noted that heavier aircraft were not necessarily more unsafe, due to improvements in the aircraft technology, and affirmed the trial court on this ground.

The next two cases focus on the attempt by one municipality to control the operations of the airport owned and operated by another municipality. The Connecticut case of United States of America v. City of New Haven et al., 367 F. Supp. 1338, 496 F.2d 452 (2nd Cir.),cert.denied 419 U.S. 958 (1974), brought an end to the attempts by the City of East Haven to regulate the over-flights from the airport owned, operated and located in the City of New Haven. The City of East Haven, in an to effort reduce the noise level in its community by prohibiting the use of the airport runway which was physically located in New Haven, threatened to enforce a contempt order if any aircraft operating from this runway flew over the "clear zone" at the end of the runway within the jurisdiction of East Haven. The court concluded that Congress had legislated too pervasively in this area of navigable air space. Consequently, state or local provisions which conflicted with these regulations, whether legislative or judicially inspired, were invalid, and the City of East Haven's prohibition was invalid.

The judiciary in the New Jersey matter of Township of Hanover v. The Town of Morristown, 108 Su. 461, 261 A.2d 692, 343 A.2d 792 (Supr.Ct.App.1975) attempted to reach a compromise in a legal battle between Morristown, the owner of the airport, and Hanover, where the airport was located. The citizens of Hanover wanted to prohibit the physical and operational expansion of the airport. The lower Chancery Court did not proscribe the physical expansion of the airport but did place some operational restrictions on the airport. These restrictions could be divided into those dealing with the navigable airspace (jet aircraft curfew and preferential runway stipulations) and those characterized as ground operations (requiring noise suppression devices for use in jet maintenance, a curfew on engine testing for maintenance, etc.). Two and a half years after the lower court had entered the judgment to implement these various restrictions, Morristown, in reliance upon the U.S. Supreme Court's decision in Burbank (*supra.*) was granted its motion to vacate that part of the original judgment which dealt with a preferential runway scheme and the jet aircraft curfew. However,the noise abatement procedures recommended for ground operations were allowed to stand. In this case it seems that the non-airport proprietor, Hanover, was able to dictate those noise abatement procedures which focused on airport ground operations.

Once again California was the forum of controversy with two cases that examined the power of the state to restrict aircraft and airport operations. In the first case of Air Transport Association of America v. Crotti (*supra.*) the state, in an effort to achieve a community noise level of 65 dB(A) by 1985 in areas adjacent to airports, issued regulations involving two different types of noise level measures and limits. The first regulation set a maximum community noise equivalent level (CNEL) for a residential community noise exposure level of 65 dB(A) by 1985. The second regulation required the establishment of

maximum single event noise exposure levels (SENEL) for aircraft operations at each of the airports. This last regulation also included criminal penalties (California Depart. of Aeronautics Title 4, Subchpt. 6, art. 1-14, 1970 replaced by Title 21, Subchpt. 6, art. 1-14, 1979).

This court interpreted the Burbank decision to proscribe the use of police power but not proprietary control. The court reasoned that the right to control airport operations necessarily flows from the airport operator's liability for the consequences of the airport operations. This right of proprietorship control can be at the airport operator's own initiative or directed by state police power, and this authority to control is exempted from federal preemption. The court perceived that the local airport authorities were political subdivisions of the state and as such the state had the right to reach down and direct their activities to some degree.

The question is to what degree? The court determined that the state could dictate regulations dealing with airport ground operations, such as land use planning or shielding of ground facilities, and therefore the regulation directing the use of CNEL was not per se invalid. However, the court did not address the issue of what would happen if the CNEL standard mandated by the state, as a practical matter, required the airport proprietor to restrict the frequency of aircraft operations or the type of operational activities -- an issue which flirts with controlling air traffic and thus navigable airspace. But the court decided that the enforcement of the noise measure, single event noise exposure level (SENEL) invaded this very area of federal preemption and characterized the SENEL regulations as evidencing state exercise of its police power, as well as interfering with aircraft in direct flight.

In light of this ruling, it is interesting to note the approach to an attempt by the State of California to impose an extended curfew on commercial airline operations at a municipal-operated airport in San Diego Unified Port District v. Gianturco, 457 F. Supp. 283 (S.D.(a) 1978). The court held that the state could not direct the Port District, as the airport proprietor, to exercise its proprietary powers to abate noise in this manner. It would seem this holding is in direct opposition to the previously discussed Crotti decision. However, in Crotti the state did not implement specific directions for the airport proprietor to follow but rather made suggestions as to the noise abatement procedures available to the proprietor to achieve the CNEL of 65 dB(A). The court in Gianturco undoubtedly saw the implications that if the state were successful in attaching a condition to a use variance, then other agencies of the government would attach conditions to licenses, permits or variances and thus control airport activities.

As evidenced by the analysis of the previous cases, the courts have carefully guarded the airport proprietor's authority to control airport operations. They have approved legislative or judicially imposed restrictions on a very limited basis and only in cases where there is no interference in a federally preempted area. The courts and the federal government will, in all probability, continue this trend in support of airport proprietor generated regulations. If non-airport proprietors were allowed to enact regulations which restrict airport operations, it might well invite a decline in economic growth for the airport and the communities that are served by them. On the other hand, the rules adopted by the airport proprietors appear to be tempered by the economic interest of maintaining a viable and profitable airport enterprise. More importantly, if the airport proprietors are to be held liable for noise-related damages, then they should have the regulatory means to promolgate noise abatement measures and hopefully decrease the chances of additional aircraft noise inspired litigation.

III. LEGAL THEORIES AND TRENDS IN AWARDING DAMAGES

When people are subjected on a daily basis in their homes to the sound of aircraft takeoffs and landings, they want relief from the noise. That is, ideally they would like the court to issue an injunction and have the aircraft operations cease and desist. However, this is not a practical solution to such a complex problem, and instead the annoyed community seeks relief that is usually spelled (as the cases will attest): MONEY.

This analysis of recent court decisions has indicated that many of the legal theories underlying the causes of action for aircraft noise damage have expanded. The traditional Constitutional theory of inverse condemnation has broadened in scope, along with the tort theory of nuisance. It is evident from the cases that the courts are awarding residents near an airport, who are subjected to excessive noise, monetary relief not only for property damages but also for emotional distress caused by aircraft noise.

• INVERSE CONDEMNATION

Inverse condemnation is the deprivation of private property by a governmental agency without just compensation. The theory involves the use of the airspace in such a manner that noise levels generated by aircraft cause land value to decrease. When the governmental entity fails to follow the approved legal procedures for acquiring the private property, or at least an avigational easement with respect to it, then the land owner may initiate legal action against the public entity to recover the value of the property right that has been forfeited.

In most federal courts, the property owner must prove there was a sufficient loss of use and enjoyment of the land to constitute a taking under the fifth amendment. This rule denies recovery for consequential damages in absence of any taking. As a result, many states have included in their constitutions the provision in substance that private property shall not be taken or damaged for public use without compensation. However, the federal obligation has not yet been enlarged either by statute or by Constitutional amendment.

The federal cases which dealt with this issue held that for a landowner to recover damages for aircraft generated noise under the theory of inverse condemnation, the offending aircraft had to fly below a prescribed altitude directly over the property in question (United States v. Causby, 328 U.S. 256 (1946), and Griggs (*supra.*)). This position was affirmed a year later in the lower court decision of Batten v. United States, 306 F.2d 580 (10th CIR. 1962), cert.denied, 371 U.S. 955, rehearing denied 372 U.S. 925 (1963) where the plaintiff was denied recovery because there were no direct aircraft overflights.

The state court decisions have for the most part deviated from the federal court trend by allowing recovery to landowners both under and near the flight paths. The courts in two leading pre-1973 state decisions, Thornburg v. Port of Portland, 233 Or 178, 376 P.2d 100 (1962), 415 P.2d 750 (1966) and Martin v. Port of Seattle, 64 Wash. 2d 309,391 P.2d 540 (1964) acknowledged but rejected the line of federal cases which required direct overflights. The court in Martin formulated their rejection by saying: "We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land."

A more recent state decision, in Alevizos v. Metropolitan Airports Commission of Minneapolis and St.Paul (MAC) (*supra.*) followed this trend and did not require direct aircraft overflight in order for plaintiffs to recover damages. The property could be close to, but not directly under the flight path. The Minnesota court's interpretation of taking, like in Thornburg and Martin included adjacent property to the flight path. These holdings were not limited by the federal court decisions in Causby and Griggs.

The court of appeals in the California case of Aaron v. City of Los Angeles (*supra.*) affirmed the trial court's decision to hold the municipal airport operator liable for taking or damaging of property "where the owner can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property and interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share." The court also stressed there was no reasonable bases for making a legal distinction between the "effects caused by flyby aircraft and the same effects caused by flyover aircraft."

In order to support the theory of inverse condemnation and allow the landowner to recover for the deprivation of private property, it is necessary to show a definite and measurable diminution of market value in the property. In the Florida case, Adams v. County of Dade, 335 So. 2d 594, writ denied 344 So.2d 323 (1976), the plaintiffs met their burden by showing that the operation of the Miami International Airport was "a direct and substantial invasion of their respective property rights." However, the plaintiffs failed to demonstrate a subsequent diminution in the property value. Instead the property values had

increased due to inflation and the demand for real property in Dade County. There was no provision in the Florida constitution for compensation if the property had been damaged or destroyed. "Condemnation can only lie where there is a taking, and the test of damages in inverse condemnation is still the reduction of fair market value."

Two New York cases, Kupster Realty Corp v. State of New York (*supra.*) and 3775 Genesee Street v. State of New York (*supra.*) attest to the states' attempt to relieve itself from present and future liability for property damages resulting from aircraft noise by formally acquiring avigation easements. In both of these cases the court reasoned that the State acquired, through the easement, a right to make noise, but this was a "finite, specific right, encompassing no more than the noise levels shown" (Kupster). If in the future, the landowners could prove damages due to increase air traffic and jet usage, they could bring an action in inverse condemnation and recover for this additional burden on the avigation easement.

The plaintiff school district in the Washington state case of Highline School District, King county v. Port of Seattle 87 Wash. 2d 6, 548 P. 2d 1085 (1976), initally brought an action against the Port, as airport proprietor, seeking recovery of noise related damages and claimed inverse condemnation, nuisance and trespass. The state supreme court in this case dismissed the latter two causes of action stating that the proper cause of action for loss of property rights in this jurisdiction was inverse condemnation because the "evolution of this theory in the airport cases has made reliance on traditional tort theories unnecessary."

- TRESPASS

Contrary to the holding in the Highline School District case, the principles of tort law were being recognized in other state courts. The legal theory of trespass is defined as the uninvited entry upon the land of another. This wrongful entry requires that the intrusion must be of a physical nature. In practical terms, when related to aircraft noise problems, the debate has often revolved (as under inverse condemnation principles) on the proximity of the airplane to the land in question. The view in the state courts has been it is the airplane noise that is relevant and not the location of the airplane over the land.

The Pennsylvania trial court in the Petition of Ramsey 342 A.2d 124, 375 A.2d 886 (Pa. 1977), based its decision on trespass where there were direct aircraft overflights. The state court of appeals affirmed the lower court. The court ruled that where airplanes strayed from their established glide paths (established by FAA to be in the area but not over plaintiff's property), and flew directly over the plaintiff's property, the action would lie in trespass and not in inverse condemnation. The state appellate court distinguished Ramsey from the federal cases by noting that the limited number of aircraft operations in this case would not be substantial enough to represent the type of taking contemplated in Causby and Griggs (*supra.*).

- NUISANCE

Another tort theory that has become more accepted in the last few years (much to the disconcertedness of airport proprietors) is the theory of nuisance. Briefly, nuisance is non-trespassory repeated invasion of the land which substantially deprives the owner or occupant from use and enjoyment of the land. Traditionally, legal actions that are founded upon nuisance have only

granted recovery where there is decreased value in property rights and not for aircraft noise-related effects on people. However, increasingly courts have interpreted liability for aircraft noise to include perceived harm to the mental and emotional well-being of people.

The supreme court of Massachusetts affirmed the lower court's decision in HUB Theatres Inc. v. Massachusetts Port Authority, 370 Mas. 153, 346 N.E. 2d. 371, cert. denied 429 U.S. 891 (1976), to dismiss an action brought by plaintiff drive-in theatre owners against the Massachusetts Port Authority for recovery under the tort theory of nuisance created by aircraft overflights from Logan International Airport. In this case, a Massachusetts' state statute prohibited this cause of action as a basis for recovery. The rationale was that the State can pass a statute which allows certain actions to be done which otherwise would be considered a nuisance. The court noted, however, that even though the State statute sanctions certain conduct, it cannot be construed to allow negligent conduct. The plaintiff's case was dismissed for failure to allege that the Port Authority was conducting the airport activities negligently, or that such activities were unreasonable or unnecessary. The Massachusetts court recommended that the plaintiff's bring their action against Logan Airport under the theory of inverse condemnation.

In a federal court, the plaintiffs in Virginians for Dulles v. Volpe, 344 F.Supp. 573, (E.D. VA. 1972), 541 F. 2d 442 (4th Cir. 1976), brought an action using nuisance and Constitutional theories against the FAA as the operator of the airport. These were two of the causes of action employed in an effort to abate noise from jet aircraft operating from Washington National Airport. The citizens group argued that the airlines are the "instrumentality by which the FAA creates a nuisance." The nuisance concept in this case was brought under the U.S. Constitutional amendments: the fifth which encompasses the right to

be protected from injury to health; and the ninth which goes to the right to privacy and not to be personally injured. However, the plaintiffs were unable to support the allegations with evidence of specific personal injuries related to noise from the airport, so these arguments failed. The court in Virginians for Dulles also reasoned that the federal regulations and laws have preempted the federal common law of nuisance so far as emissions from airplanes are concerned.

The judiciary in the California case of San Diego Unified Port Authority District v. Superior Court (Britt), (*supra.*) concurred with the spirit of the Virginians for Dulles decision by denying recovery for damages caused by noise from aircraft in flight, because the federal government controlled navigable airspace. This was distinguished, in the court's opinion, from allowing recovery under nuisance theory for personal and property injuries from the airport proprietor for tortious mismanagement of the airport operations itself. The court concluded that if it levied damages for aircraft flight related noise thereby permitting local liability, this would be "tantamount to state regulations of an area" that is within exclusive federal jurisdiction.

The most current case which broadens the scope of the airport proproprietor's liability under the theory of nuisance is the California case of Greater Westchester Homeowners Association v. City of Los Angeles, (*supra.*) which was affirmed by the California supreme court in favor of the plaintiffs and denied certiorari by the U.S. Supreme Court. The homeowners won on the nuisance action claiming emotional distress (which was independent of their claim for diminution of property values) against the municipality airport proprietor for excessive noise emanating from jet aircraft. The court ruled that the federal regulations and laws do not shield the airport proprietor from tort damage liability. Excessive airport noise is a combination of aircraft operations, site location of the runways and facilities, and the

noise abatement procedures advocated and controlled (subject to FAA supervision) by the airport proprietor.

Under traditional nuisance theory, findings of emotional distress necessitates a related physical injury. However, Judge Jefferson, at the trial court level, based his findings of emotional distress not upon any physical injury (such as hearing loss), but rather based the amount of recovery upon personal testimony evidence to establish the intensity of effects and duration of aircraft noise exposure. The ruling also included the admonition that the compensation for these past injuries would not prohibit these very same plaintiffs from bringing the same cause of action for subsequent injuries from the continuing aircraft nuisance. This rather liberal interpretation of personal injury nuisance law as it relates to aircraft noise was a clear warning to the airport operators to take a more affirmative position in seeking aircraft noise abatement solutions.

The court also denied the defendant's argument that the California statute (Civil Code Sect. 3482) provided the airport with immunity from nuisance liability. The defendant-City argued that the aircraft operations are expressly sanctioned by statutory law which provides in effect that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance" (CCC 3482). The California Supreme Court concluded that the statutory sanction plea was unavailable to the municipality airport proprietor concerning "acts which by their very nature constitute a nuisance." These acts, according to the court, must be expressly authorized in the terms of the statute to insure that the legislature intended to sanction a nuisance. In other words, while the statute designates the use of the runways for aircraft, it does not expressly authorize the excessive noise levels of the aircraft on the runways.

The court decisions which have held airport proprietor's liable for aircraft noise related damages have increased in number and in scope. The trend is obvious, from the earlier cases which required direct aircraft overflights (Causby and Griggs,) to allowing adjacent flybys (Alevizos,) to the Greater Westchester ruling that allowed recovery for noise-related emotional distress. The airport proprietors who are liable for the consequences of aircraft generated noise are more than casually concerned.

IV. EFFECTIVENESS OF LAND USE PLANNING AND ENVIRONMENTAL IMPACT STATEMENTS

• EFFECTIVENESS OF LAND USE PLANNING IN AIRPORT NOISE CONTROL

While it seems that the federal government has preempted a major portion of the area dealing with aircraft noise control, it is important to recognize those aspects over which the federal government has not assumed jurisdiction. The U.S. Constitution has delegated to the state and local governments the traditional responsibility for the health, welfare, and safety of their citizens. This implies the power to control local zoning, acquire an interest in the land through easements (such as avigational easements), develop compatible land use guidelines, exact building codes, or determine airport locations. The following cases exemplify the efforts of various local authorities to implement the concepts associated with developing a noise control plan.

Two court decisions in New Jersey held that the federal government does not preempt state or local governmental authority in determing the location of a private heliport. The federal legislation contemplated that the state or local governments should retain the power to regulate ground activities not directly involving aircraft operations. In both cases, Garden

State Farms, Inc. v. Bay II et al., 136 N.J. Super. 1, 343 A. 2d 832 rev'd. 146 N.J. Super. 438, 370 A. 2d 37 mod. & aff'd. 77 N.J. Super. 439, 390 A.2d 1177 (Sup. Ct. 1977), and Application of Ronson Corporation, 164 N.J. Super. 68, 395 A.2d 866, the court advised the State Commissioner of Transportation that while he had discretionary power to determine the location of the heliport, he should consider the local interests and recognize that local zoning ordinances are important in selecting an aviation facility that is compatible with the surrounding land uses.

Local municipalities can use their zoning powers to prohibit the construction of an airport or to determine the type of compatible land use that will develop in the areas adjacent to the airport. An Illinois case, Wright v. Winnebago County, 391 N. E. 2d. 772 (1979), was an example of an attempt by the County to prevent the construction of a private airport. The Court dismissed the case for other reasons, but held in passing that the County could zone on the basis of aircraft noise, because "the FAA does not preempt local, or state power to decide whether to allow new private airports on the basis of potential noise problems" (FAA Act of 1958, Sect.101 *et seq.* as amended 49 U.S.C. 1301 *et seq.*).

In La Salle National Bank v. County of Cook et al., 34 Ill.App. 3d 264, 340 N. E. 2d 79 (1975), and in a California case, Olinger v. City of Palm Springs, 386 F. Supp. 1376, rem'd. 538 F. 2d 338, rem'd 425 F.Supp. 174 (C.D.Cal. 1977), the municipalities used zoning powers to restrict the property near airports to nonresidential use. The landowner in the Palm Springs case lost in his effort to prevent the City from rezoning the land from residential to open air land zone to establish a noise buffer zone near the airport.

The plaintiff in La Salle sought a zoning change from manufacturing to multiple family residential, but the appellate court affirmed the lower court's decision to uphold the validity of the county ordinance which restricted building height. The court reasoned this was a proper exercise of police power because there was an appropriate need, due to increased aircraft traffic, to protect the public from air hazards. Further, this ordinance did not create an air easement which would amount to a taking of private land for public use without just compensation, because the land could still be used for industrial development.

The local governmental authority or the airport commission can acquire an interest in the land adjacent to an airport, by formally imposing a height restriction and taking an avigation easement (Kupster Realty Corp., *supra.*, and 3775 Genesee Street, Inc., *supra.*). If the airport Commission has the power to take avigational easements in order to operate the airport (Alevizos et al., *supra.*), it can also be compelled to acquire for compensation, through inverse condemnation actions, an avigation easement if the aircraft overflights are of such magnitude as to cause a direct and substantial invasion of property rights.

In order for the airport and the immediate community to coexist, the airport operator, local municipality, and the state government must take affirmative action in developing a viable noise control land use compatibility plan. The federal government will not infringe upon local or state government attempts to rezone the land, acquire air easements, impose building codes or height restrictions, or locate an airport if it is pursuant to a legitimate state interest in protecting the health, welfare and safety of its citizens.

- THE EFFECTIVENESS OF AN ENVIRONMENTAL IMPACT STATEMENT IN AIRPORT NOISE CONTROL

The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), includes among other things, the requirement that an environmental impact statement (EIS) be prepared for all major federal actions that may signficantly affect the quality of the environment. It must contain detailed plans of the project, and a forecast of the possible environmental consequences as well as feasible project alternatives. NEPA is aimed at requiring federal officials and not private parties to regulate their activities so that they will comply with certain procedures or goals as defined by Congress. Some of the states have passed similar statutes and require an environmental impact report (EIR) whenever a project is contemplated by the citizens of the state that could conceivably affect the environment.

Often the federal or state governmental agencies such as the FAA and CAB or government officials (FAA Administrator Alexander P. Butterfield) have been named as parties in litigation which seeks to halt airport expansion by alleging failure on the part of that agency to prepare an EIS, or if one has been filed, then inadequacy in report preparation.

The requirement that an environmental impact statement be prepared is not limited to the inception of a totally new project. If there is a possible effect on the environment due to the contemplated initiation of a major federal action involving an on-going project, then an EIS would also be required. In a U.S. District Court case in Illinois (State of Illinois v. Butterfield, *supra.*), the former FAA Administrator, Alexander Butterfield, and the FAA Regional Adminstrator, John Cyrocki, were charged with failure to prepare an environmental impact statement as required by NEPA. The suit dealt with the increase of aircraft operations and the accompanying noise and air pollution

at Chicago's O'Hare International Airport. The federal agencies of the FAA and CAB were charged with implementing several actions such as approved installation of equipment which resulted in enlarging the airport's capacity to handle a larger number of aircraft. The court determined that this substantial increase, at an already very busy airport, was adequate evidence to indicate a need for an impact statement, and compelled the FAA and CAB to prepare one before continuing to increase aircraft traffic and operations at O'Hare.

The FAA in the case of Virginians for Dulles v. Volpe (*supra.*) argued that no impact statement was necessary for the two federally operated and owned airports because there was no major federal action planned within the meaning of NEPA. However, the U.S. District Court found there was a substantial increase in the population near the airport and a growing number of aircraft operations. There was also an indication in the federal budget that a modernization of the Washington National Airport was contemplated in the near future. This was enough to support the need for the FAA to perform an EIS study before initiating any further airport expansion.

Some construction projects were joint ventures undertaken by the state and federal government. The City of Romulus v. County of Wayne, 392 F. Supp. 578 (E.D. Mich. 1975), was such a case. The City and the citizens in Romulus wanted to halt the construction of a proposed runway at Wayne County airport, or, at least, prevent the use of federal funding until an adequate EIS had been prepared. The FAA had initially performed an EIS study, but the court found it lacked a great deal of information regarding the impact of the proposed runway on the environment. The court could not stop the construction of the entire project, but it did enjoin further federal funding until the EIS met the NEPA requirements.

Over the years the state and federal agencies have learned from experience that it is more efficient to perform an acceptable environmental impact study at the beginning of a project, than risk jeopardizing the project or incurring unanticipated financial expenditures. Thus, not that many cases have recently come to trial. If they do, as in the Luke Air Force Base case, Westside Property Owners v. Schlesinger, 415 F. Supp. 1298, (D. Ariz. 1976), reh.denied, 597 F.2d 1214 (9th Cir. 1979), the court will in all probability find that the federal government has done an admirable job in considering the environmental effects and balancing the reasonable alternatives.

** AIRPORT NOISE LITIGATION: CASE LAW IMPLICATIONS**

This extensive review of the most relevant judicial decisions on aircraft noise lititgation indicates that the courts continue to hold the airport proprietor liable for damages resulting from aircraft noise. At the same time, the judiciary is expanding the legal theories associated with noise litigation and is granting recovery for noise related effects on people under the nuisance theory of emotional distress as well as under the traditional inverse condemnation theory for deprivation of property. As a result of this increase in potential liability, the airport proprietors and the municipality non-proprietors, with or without federal guidance, are implementing airport use restrictions in an attempt to decrease objectionable noise levels and avoid a possible lawsuit. Because of the lack of definitive federal direction in these regulatory matters, the courts have been forced into the position of the rulemaker to determine, on a case by case basis, how close the use restrictions come to encroaching upon an area historically perceived to be federally preempted.

In order to avoid aircraft noise exposure problems before they arise, municipalities and airport operators with land acquisition power, are purchasing land, rezoning, or acquiring air easements in the communities adjacent to the airports. And finally, federal or state controlled agencies have learned to accommodate themselves to the requirements of preparing adequate environmental impact statements and reports whenever they undertake projects which could conceivably influence the environment.

Court history from Griggs, 1962 (*supra.*) to Greater Westchester, 1980 (*supra.*) has consistently placed liability for aircraft noise effects experienced by property owners squarely upon the airport proprietor. The federal government (unless acting as an airport proprietor) has been absolved from financial responsibility for airport related noise problems. The courts up to this point have not been persuaded by the arguments of airport proprietors that the federal government through its agencies (such as the FAA or CAB) and the accompanying federal laws and regulations have so totally controlled air commerce that they should be the legally responsible party in a lawsuit for noise damages.

The FAA position, as implied in the "Aviation Noise Abatement Policy" of November 1976, is to avoid complete federal preemption of the field of aviation noise abatement. The federal government perceives that the solution of control and reduction of airport noise should remain a mutual responsibility of the airport proprietors, users and the governments. However, in the FAA Notice of Air Transport Association Petition for Rulemaking on Airport Noise Abatement C.F.R. Plans (44 FR 52076, September 1979; 14 C.F.R. Ch.1), the ATA attempted to calm FAA's apparent fears of financial liability, and reasoned that federal preemption could co-exist under the concept of shared responsibility with the airport proprietors and still not impose financial liability on the federal government.

Traditionally, the landowner had to prove that aircraft flew directly over the property at a minimally specified altitude and with such frequency as to constitute a taking of the property by depriving the owner of substantial use and enjoyment. This was the classic rubric derived from the salient federal cases in the field (Causby and Griggs, *supra.*). But times have changed and the state courts will consider awarding damages under inverse condemnation for aircraft noise generated from flybys

adjacent to the property boundary lines as well as for direct overflights. The state courts in their generosity have interpreted the state constitutions to include in the legal theory of inverse condemnation the concept of taking and damaging of the property by aircraft noise. Thus, a landowner could be awarded damages for aircraft noise if the property was not directly under the flight path and there was a taking or damaging of the property which resulted in a diminution of market value.

Some state courts have allowed recovery under the civil tort theory of nuisance which includes property and personal injury. In Greater Westchester (*supra.*), the court considered emotional distress a compensible injury and awarded the plaintiff homeowners damages caused, according to the court, by "a loss to the homeowner of the use and enjoyment of his home which results in his annoyance, discomfort, mental or emotional distress."

The court in this case made another statement that could herald the financial facts of life for the airport proprietor's future. The judge ruled that the injured plaintiffs could again bring suit at some later date for damages for continuing emotional and mental distress attributable to aircraft noise. If the airport operators are faced with this expensive prospect, they are left no choice but to try and attenuate objectionable noise levels before they find themselves again in front of the magistrate.

While the airport operator has an economic incentive to abate the noise levels, the necessary authority to achieve this goal is limited by the federal plenary powers in interstate commerce and navigable airspace. The "Aviation Noise Abatement Policy", published by the FAA/Department of Transportation in 1976, stated that the FAA would "review and advise" the airport operator as to the acceptability of any operational use restrictions that the airport proprietors might want to impose. However,

the FAA declined an invitation to "review and advise", the San Diego Port District in a dispute with the State of California over whether to extend a curfew (Gianturco, *supra.*). If the federal government fails specificially to identify, through legislation, or in an advisory capacity acceptable use restrictions, and the airport operators continue to promulgate their own regulations in an effort to reduce noise exposure levels, then courts are left with the task of bringing some order to this confused area.

Aviation noise case law indicates that the airport operators will not limit the proprietary use restrictions to airport ground operations alone. The number and type of regulations imposed on the airport users at the City-operated Santa Monica airport is a prime example of how far a municipality-airport proprietor is willing to challenge federal preemptory powers. The U.S. District Court upheld all the restrictions with the exception of the jet ban on Constitutional grounds.

The court ruled that the City of Santa Monica's use restrictions were non-discriminatory and did not impose an undue burden upon interstate commerce. Since this case is currently on appeal, the courts will once more have an opportunity through an expensive litigation process, to review the propriety of at least some of these restrictions. The fact that Santa Monica is a small general aviation airport undoubtedly influenced the court its finding that even the completely exclusionary nighttime curfew would pose only an incidental burden upon interstate commerce.

This is the most recent case in a line of cases (Hayward and Crotti *supra.*) where the courts applaud the airport proprietor's efforts to try to alleviate the noise problems. It is clear that this area of use restriction is one that needs uniform regulations. The dicta in Crotti suggested that an airport

proprietor had the right to determine the type of service and aircraft and the permissible noise levels for the aircraft using its facilities. If this is an indication of the court's future reasoning when ultimately confronted with other proprietor imposed use restrictions, then it is not inconceivable to contemplate a situation where several airports across the country would have curfews specifying different time intervals for aircraft operations. Additionally, various airports could promulgate different noise level related curfews, similar to the curfew in Hayward, that excludes aircraft with certain noise levels from operating during certain hours. If this occurred with enough airports across the country, the resulting impact upon interstate commerce would not be "too speculative" (Hayward), but would indeed introduce further chaos into the air commerce system.

This area of aviation noise abatement, for obvious reasons, is one that definitely needs a system of uniform regulations. State and local governments, in an effort to protect the health and welfare of their citizens, often impose use restrictions on the airport when existing zoning ordinances were not effective enough to control the noise exposure levels. One of the cases indicated that a municipality that was not an airport proprietor may impose restrictions which deal with ground operations such as noise barriers, or limiting engine testing to certain hours (Hanover, *supra.*). Realistically, in light of the Burbank opinion, the courts would not be disposed to allowing the municipality as a non-airport operator to control airport operations.

However, the municipality does have powers not preempted by the federal government to provide for a quieter environment through land use planning. The case law indicates that the state or the local governmental authority can use its zoning power to determine whether the area adjacent to an airport will be an open air buffer zone, or developed for non-residental use.

The private (non-municipality) airport operator can acquire an interest in the land adjacent to an airport through air easements, but cannot rezone the land to prohibit residential development in the vicinity of the airport. The private airport operator has limited ability to control the land adjacent to the airport unless the municipality which is impacted by the airport will cooperate. While Burbank Airport (as Lockheed Air Terminal), at one time might have been the only privately owned and operated commercial airport in the country, there are currently many instances where the commercial airport is located within the jurisdiction of one city, but is operated under the authority of another. For example, Ontario Airport, which is located in San Bernardino County, is operated by the Los Angeles Department of Airports. Under such circumstances, it would be beneficial for the airport proprietor to have a specific contractual agreement with the landlord municipality that would assure the airport proprietor of enough control over adjacent land to prevent housing developments up to the edge of the runways.

This area of land use planning is also ripe for federal guidance in terms of uniform regulations. Some airports (New York's Westchester County Airport) are physically located in, or impact more than one municipality, or even more than one state, each with different zoning regulations. Some states, even today, have no established zoning practices. The federal government throughout its many funding programs could provide incentives for the municipality and the state (such as under the Air Installation Compatible Use Zone (AICUZ) policies (32 C.F.R. Part 256,42 F.R. 733, January 4,1977) or the HUD (Housing and Urban Development) programs) to instigate land use programs and zoning regulations that would consider the impact of an airport on the community, and either acquire the land or rezone it in an effort to avoid paying damages in a court of law.

The fundamental issues litigated over the years have not changed and are a reflection of the federal government's apparent fears that financial liability for airport noise damage may attach if there is a federally inspired uniform system of regulations in the field of aviation noise control. If the federal government abdicates its responsibility in this area then it falls to the courts to attempt, on a case by case assessment, to define the airport proprietor's authority in determining reasonable means to control aircraft noise.